



2822 North Martin Luther King Jr. Blvd.
Lansing, MI 48906

Fax Cover Sheet

DATE:

TIME:

TO: John Heyer,
Janet Yandik

PHONE:
FAX: 703 - 603 - 0655

FROM: Peckham

PHONE: 517-319-6030
FAX: 517-319-8490

RE: Comments on Rulemaking

Number of pages including cover sheet:

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December 10, 2004

To: President's Committee for Purchase From People
Who Are Blind or Severely Disabled
1421 Jefferson Davis Highway
Jefferson Plaza 2, Suite 10800
Arlington, VA 22202-3259
Attn: Mr. John Heyer; Janet Yandik

To: Ms. Katherine Astrich, Policy Analyst
Office of Management and Budget
Office of Information and Regulatory Affairs
Eisenhower Executive Office Building
725-17th Street, N. W.
Washington, DC 20502

On behalf of Peckham, Inc., we are writing to express our opposition to the proposed notice of rulemaking [Docket No. 2004-01-01] from the President's Committee for Purchase From People Who Are Blind or Severely Disabled. The proposed rulemaking on governance standards for nonprofit agencies participating in the Javits-Wagner-O'Day (JWOD) Program exceeds the scope of the Committee's authority and Congressional mandate. We are in agreement with the findings submitted by Goodwill International on behalf of all the Goodwills, and further submit additional comments in demonstration of the untenable nature of the proposed rules.

Peckham is a private nonprofit agency participating in the JWOD program. Last year we served 3,443 individuals with disabilities or other barriers to employment. Overall we support and applaud the Committee's desire to strengthen non-profit boards and ensure that they have the ability to provide ethical stewardship and leadership to the agency. We too have been alarmed by news accounts of the few instances of excessive compensation at non-profit agencies and fully support the IRS investigation. While non-profit agencies have not been required to comply with the Sarbanes-Oxley Act, our board adopted its guidelines and has incorporated them into our governance structure. We follow the best practice guidelines published by the Michigan Non-profit Association and we are CARF Accredited. In addition to going beyond the congressional authority given to the Committee, we feel the proposed rules in 51-2.10 are detrimental to the intended action of strengthening boards, have not been well thought out, contain confusing directives, expose agencies and boards to new areas of risk and liability, and require boards to certify items based on knowledge of which the board or agency does not have access.

A number of the proposed regulations are not supported by guidelines published by the Better Business Bureau's Standards for Charity Accountability and the Michigan Nonprofit Associations "Principles and Practices for Nonprofit Excellence". While Peckham currently does not pay above the proposed salary ceiling, we are concerned that the Committee, in going beyond what has been recommended by authorities in the field of nonprofit management, has, in fact, weakened the long-term stability and viability of

Peckham, Inc.

12/10/2004

-- 1 --

community rehabilitation programs. In the remainder of this document we will provide specific comments on each paragraph of the proposed rules that we find alarming or untenable.

Comments on Proposed Rulemaking 41 CFR Parts 51-2

This document contains our extreme concern regarding the proposed changes in 41 CFR parts 51-2, the impact the proposed changes have as regards the Regulatory Flexibility Act, Executive Order 12866, Executive Order 13132, Unfunded Mandates Reform Act, and the Paperwork Reduction Act, as well as the detrimental impact on an agency's ability to continue to serve the community and meet its mission.

51-2.10 Program participant governance.

51-2.10 (a)(4) Reviews and certifies executive compensation packages, and develops and implements and annual evaluation process for the Board or other governing authority, as well as for the central nonprofit agency's or nonprofit agency's CEO, President, Executive Director, or equivalent;

Comment- Our concern in this paragraph is with the word 'certifies'. This rule would require our board to 'certify' financial information that is un-audited according to the date due on the certification form and the specified year that the certification form covers. To require a board to certify un-audited information puts the board at a huge risk, may well impede board recruitment and could have a financial impact on the cost of board liability insurance. An ethical board member would not certify un-audited financial information. We have great concern that the new proposed form also requires un-audited information that is the same as audited information required on the IRS 990 form. This puts the board in a situation where they are certifying un-audited information on the annual certification form that very well could differ from the information published on the 990 form. The annual certification form carries the language " This certification concerns a matter within the jurisdiction of an agency of the United States and the making of false, fictitious, or fraudulent certification may render the maker subject to prosecution under title 18 USC 1001".

Recommendation: Either remove the word 'certifies' or remove the requirement to submit 990 information prior to the audit on the new propose form.

51-2.10(a) (6) Turns over Board, or other governing authority, membership on a recurring schedule;

Comment- This section is unclear, confusing, and does not provide the information needed to be in compliance. Our Board has 'turn over' and each board member is

appointed to a specified term of x years. Our bylaws permit board members to be reappointed for additional terms upon board vote and approval. The board is free to approve or not approve additional terms and there is no limit to the number of terms a board member may serve. Based on the proposed rule as written, we cannot determine whether we would be in compliance. If the intention is to limit the number of terms a board member would serve in order to have higher turnover, what is the desired level of turnover and to what extent? Should the board have complete turnover every 10 years? Every 40 years? If the intention is to limit the number of terms a board member would serve then we also feel that this conflicts with the obligation and duty of the board to ensure the best governance possible. In Michigan term limits have greatly weakened the ability of our elected officials to lead through informed decisions based on an accumulated body of knowledge and awareness of past issues. This has led to greater reliance on state civil servants and has unintentionally transferred too much authority to non elected state employees and staffers. For proper governance, nonprofit agencies need informed, stable, and active board members who can contribute to, and provide stewardship of, the nonprofit's mission. We feel that this proposed section endangers the board's ability to achieve that goal and would have the unintended consequence of weakening the board's ability to govern and thereby transfer too much authority and reliance on the CEO. This proposed regulation as written is not supported by best practice guidelines such as the Better Business Bureau's Standards for Charity Accountability and the Michigan Nonprofit Association.

Recommendation: Remove the requirement to have 'turnover'.

51-2.10(a) (9) Publishes and makes public the minutes of Board, or other governing authority, meetings.

Comment – We are extremely concerned with this proposed rule, that it blurs the line between a public and a private nonprofit entity and that it conflicts with specific clauses in the Federal Acquisition Regulations (FAR). To require that a private nonprofit publish its minutes is to require that it acts in part, like a public entity. We feel this will result in misleading the general public as to its true status, expose the board to additional risk of liability, and create immense confusion as to whether the board meetings and committees are open to the public. The structure, laws, regulations, and funding streams are vastly different between a private nonprofit and a public entity. Board members of a private nonprofit agency have none of the protections that a board member of a public entity is given. In addition, a number of private, state and federal grant making programs require that when applying for a competitive grant, that no appearance of price fixing, collusion between competitors, or sharing of pricing information that would lead to a lessened competition take place prior to the opening of a sealed bid. However, that same grant may require that the application have board approval of the amount applied for as well as board approval of any match funds that they may contribute. In order to meet those requirements it has to be reflected in the board minutes. Publishing the board minutes would mean disclosing amounts in a sealed bid prior to its submittal and opening by the funding stream. This proposed rule would eliminate our ability to compete for certain

Peckham, Inc.

12/10/2004

-- 3 --

grants, put us at a disadvantage for others, and impede our ability to obtain funding for services to program participants. This proposed regulation as written is not supported by best practice guidelines such as the Better Business Bureau's Standards for Charity Accountability and the Michigan Nonprofit Association.

Recommendation: Remove this requirement in its entirety.

51-2.10-(b) In assessing the reasonableness of executive and other employee compensation, the Committee will consider:

(1) The size and complexity of the central nonprofit agency's or nonprofit agency's charter or mission;

Comment: We can see no feasible and objective way to assess the complexity of our mission. Our stated mission is to 'maximize the potential of persons with barriers to employment to achieve independence and economic self-sufficiency'. What objective criteria would the Committee use to assess the complexity involved in achieving our mission? Our mission is hard to achieve, it requires a wholehearted commitment from the board, CEO and staff, and it requires that we utilize every resource, that we advocate for our participants at every turn, that we use unconventional solutions when conventional solutions don't work. The underlying causes of poverty and the link between poverty and disability is extremely complex and the subject of many studies and research programs. In addition to attempting to solve one of society's most perplexing and persistent problems, we also participate in the textile manufacturing industry, the automotive industry, the custodial services industry, logistics and distribution, business services, maintain ISO and TS quality certifications, operate 2 residential treatment centers, 2 apartment complexes, one group home, an alternative high school, and 6 locations. We would also wonder how this assessment would take place. Would the Committee come out and perform site visits? Would they require that we write a monograph documenting a case for high complexity? We feel this would be an onerous burden on agency staff and board to gather and submit the appropriate information needed in order to meet this regulation.

Recommendation: Remove this requirement in its entirety.

51-2.10 (b) (3) The technical and professional qualifications required for positions in the central nonprofit agency or nonprofit agency;

Comment: Is it really feasible that the Committee will read and evaluate approximately 175 3-page job descriptions? Together with paragraph (1), and (2), the Committee is placing a huge burden on the nonprofit agency staff to compile and copy the requested materials. The amount of materials to make a case for executive compensation could well exceed a good size box and 160 hours or more of labor.

Recommendation: Remove this requirement in its entirety.

51-2.10 (b) (4) Compensation packages paid at comparable central nonprofit agencies or nonprofit agencies;

Comment: This section seems to require that we identify nonprofit agencies that are comparable and provide their compensation information to the Committee. Comparisons between nonprofit agencies can be fairly complex as there are a number of points to compare such as; number of consumers served, number of staff, total revenue, net income, number of locations, number of programs, number of departments, which industries they participate in, geographic location, average number of direct reports, length of time in the job, hierarchal structures and so on. It is likely we would need to hire a consultant to complete this study each year at an anticipated cost of \$30,000 or more. As in the earlier paragraphs under part (b) this is an onerous burden on the nonprofit.

Recommendation: Remove this requirement in its entirety.

51-2.10(b) (5) The percentage of the net revenues to the central nonprofit agency or nonprofit agency realized from the JWOD Program paid to employees and senior management;

Comment: We are unclear as to what the Committee is asking for in this section. We can easily calculate the percentage of net revenue to staff payroll. However this section is requiring us to use only JWOD net revenue that was paid to employees and senior staff. Our concern is that this could be misleading information depending on whether or not the nonprofit agency was doing primarily service or products. The percentage would be higher for agencies doing primarily service and lower for those doing products, and for agencies doing a mix of the two, that percentage could be pretty skewed. We would like to know in what ways the Committee intends to use this information and how they will determine whether the percentage is acceptable or not. Is there an industry benchmark the Committee will be using to compare?

Recommendation: Remove this requirement in its entirety.

51-2.10(b)(6) The extent to which the central nonprofit agency's on nonprofit agency's executive compensation packages exceed the total compensation offered to the typical, highest paid (excluding any retention allowances and Presidential rank awards), senior executive service, career Federal government employee; and

Comment: We take strong exception to this proposed standard and feel that the overall impact will be to lessen the nonprofit's ability to attract and retain qualified professionals. The nonprofit mission is vastly different than that of the Federal government. The nonprofit mission is to affect a specific change in society, to better a condition in the world, and to have a vision of how things could or should be. The role of nonprofit leadership is to ensure that the agency follows its mission. The career Federal employee's

burden is not to affect a change in society but to carry out the business of government. The CEO of a nonprofit is not a 'career' employee; they are appointed by the Board and serve at the pleasure of the Board. These are two vastly different job descriptions, with vastly different qualifications required, exposure to liability, working conditions and hours, terms of continued employment, and scope of responsibilities. This proposed standard appears as a desire to control something that in principle and right should not be controlled by the Federal government. This is a prime example of an attempt by Federal government to overreach its authority and interfere with the private sector. It diminishes one of the primary responsibilities of the Board and impedes the ability of the nonprofit to carry out its mission. Furthermore, we would question how and when the Board would have access to the information required in order to determine the total compensation of a senior career Federal employee. In the preamble to the proposed regulations it states that the current total compensation is \$207,000. What does this figure take in to account? How is the difference in the value of retirement benefits (i.e. pension plans, medical and prescription plans) taken into account? How is the difference in required number of actual working hours taken into account? Why is retention allowances removed from the calculation? Can the Committee show what they took into consideration when stating this figure, how they calculated the total compensation? We request to see this information.

Recommendation: Remove this requirement in its entirety.

51-2.10 (b) (7) For only nonprofit agencies, the median compensation package for the nonprofit agency's direct labor hour workers and how that median compares to the compensation packages offered to executives.

Comment: The sole intent of this proposed paragraph is to embarrass nonprofit agencies, Boards and CEOs as to the difference in CEO and executive compensation as compared to consumers in our training programs. Our training programs employ only those workers who are not competitive in the community's labor pool. Of course there is going to be huge percentage difference. Is the Committee's intention to set a benchmark of what that percentage difference should be? Could the Committee share with us what the benchmark is in the for-profit world? Research shows that nationally CEOs are paid 300 times the average direct labor (or 30,000 %). Let us assume that the median compensation for direct labor is \$5.15 per hour. The calculation results in an annual salary figure of \$3,213,600. We would assume that the Committee's desire would be to see that the nonprofit percentage would be less than the for-profit percentage. How much less would be acceptable? Using the above example again, to get to the \$207,000 compensation ceiling the percentage would be 1950%. On the face of it, it sounds like an inflammatory number unless it is compared to the 30,000 % found in the for-profit world. Our mission is to train those workers who are not competitive in the labor force and get them to a level where they can be competitive and help them move into competitive employment. What direction does this percentage tell us to take?

Recommendation: Remove this requirement in its entirety.

Peckham, Inc.

12/10/2004

-- 6 --

51-2.10 (c)(2) Qualified nonprofit agencies participating in the JWOD Program must certify that the governance standards set forth in paragraphs (a) and (b) of this section have or have not yet been met on the annual certification form required by 51-4.3(a) of this chapter.

Comment: This section highlights the untenable nature of the proposed regulations. This section requires that our Board certify that the *Committee* has performed all of the standards in 51-2.10 (b). 51-2.10 (b) states "*In assessing the reasonableness of executive and other employee compensation, the Committee will consider...*". How can our Board or CEO certify that the Committee has considered anything? Section (b) does not specify governance standards that the Board must follow; it specifies what the Committee will consider in looking at executive compensation. In order to comply with this section the Committee would need to provide our Board with a report that documents that they considered all that is entailed in 51-2.10 (b) (1) through (7) in order for our Board to sign the annual certification. Furthermore, while the preamble to the proposed regulations state that the Committee would see compensation above \$207,000 to be excessive, the regulations itself does not specify that the Committee would only carry out its consideration of executive compensation that exceeded the threshold, but in fact would carry out 51-2.10(b) (1)-(7) on all participating agencies, regardless of the compensation level. Therefore the Committee would be obligated to provide this report annually to all 650 participating agencies. The practicality of carrying out this proposed regulation is questionable. The Board would first have to submit a proposed compensation amount for CEOs and key employees to the Committee along with documentation for items listed in 51-2.10(b). The Committee would need to be extremely timely in reviewing all 650 submissions and return the reports to each Board with their approval or disapproval of the proposed compensation level. Only then would the Board be able to sign the annual certification. It is highly unlikely that the Committee can perform all that is entailed in 51-2.10(b) within a 30 day period.

Recommendation: Revise to omit (b) and/or allow agencies who have third party accreditation, which includes governance standards such as CARF, exemption from the Committees standards.

Comments on Certifications and Required Determinations

This section of our comments will delineate our contention that the proposed regulations do not meet the requirements of the Regulatory Flexibility Act, Executive Order 12866, the Unfunded Mandate Reform Act, and the Paperwork Reduction Act.

Regulatory Flexibility Act

Peckham, Inc.

12/10/2004

-- 7 --

We contend that the proposed regulations violate the Regulatory Flexibility Act, and that the proposed regulations would have a substantial impact on a large number of nonprofit entities. Furthermore, the impact goes well beyond that created by the additional reporting and record keeping burden, and creates serious impediments to the long term viability of nonprofit agencies. We would also comment on the statement "There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner O'Day Act", and would like to point out that the changes in the regulations proposed are duplicative of the IRS under whose authority nonprofit executive compensation is reviewed and intermediate sanctions applied if compensation levels are deemed excessive. We request that an initial regulatory flexibility analysis is prepared as specified in section 603 of Title 5 U.S.C.

Executive Order 12866

We contend with the comments found in paragraphs (a), (b), (c), and (d) as outlined below;

- (a) The economic impact could well exceed \$100 million annually in lost sales and revenues to the affected nonprofits who may have to withdraw from the JWOD program as a result of the onerous regulations. This would also result in lost jobs for people with disabilities, contrary to the intention of the JWOD act. In addition those choosing to continue to participate would lose qualified, experienced staff and board members in attempting to meet the new rules.
- (b) The IRS has the authority to rule on and implement intermediate sanctions on compensation levels found to be excessive. The IRS does not set a pre-defined level for compensation and could find that in some instances \$207,000 would be excessive compensation, thereby creating a potential conflict between regulating agencies. Furthermore, the proposed governance standards go well beyond the JWOD act. The majority of participating agencies receive only a portion of their revenue through JWOD contracts. Nonprofit agencies also receive funding from sources such as Department of Labor, Department of Health and Human Services, Department of Education, Department of Housing and Urban Development (HUD), and the Department of Agriculture. HUD has its own set of governing requirements for nonprofit housing corporations that are inconsistent with the proposed rules.
- (c) If adopted the proposal would materially affect the type of grants an agency could apply for, specifically in the case of grants that require board approval of the requested funding amount to be reflected in the minutes. We would be precluded from bidding for grants that specify that bidders may not share pricing information prior to the opening of a bid.
- (d) If adopted this proposal would raise numerous legal and policy issues stemming from increased board liability, boards certify un-audited information, potential employee lawsuits, and requiring Board minutes be made public. The governance standards as proposed go beyond best practices as can be found in the Better Business Bureau's guide to charity accountability and numerous other state nonprofit association guidelines.

Unfunded Mandates Reform Act

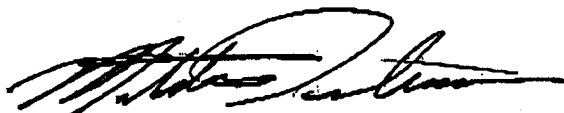
We would request that the committee perform an economic impact analysis. We would contend that the proposed regulations could cost well over \$100 million to implement. Many agencies would need to change their bylaws, perform Board recruitment and training, increase their liability insurance, recruit and train new CEOs and executive staff, suffer loss of productivity, customize software to collect the information, revise board and employee policies, take on the cost of publishing minutes, additional cost of staff time to prepare the items listed in 51-2.10 (b), loss of certain types of grants and losses due to the lessened ability to compete for revenues.

Paperwork Reduction Act

We strongly disagree with the estimate given by the Committee regarding the amount of time it will take to complete the revised form 404 and 403. As stated earlier in our comments, in order for the Board to certify 51-2.10 (b) we would need to annually prepare each of the items listed in 51-2.10 (b) (1)-(7). We believe that it would take approximately 160 hours to perform and document the items as listed. Therefore the total burden would be an additional 102,720 hours, not 10,735 hours as the Committee has suggested. Furthermore, the information requested is duplicative to the information available on the 990 form. Requiring that the Board certify un-audited information prior to the preparation of the 990 is unnecessary.

We would contend that proposed regulations are not necessary for the proper performance of the function of the agency, and in fact is goes beyond the authority of the Committee as stipulated in the JWOD Act. We would be concerned that the Committee has the resources and staff to review and respond to the estimated 650 annual submissions for approval or disapproval of executive compensation packages.

For the reasons stated throughout this document, we believe the proposed regulations should be withdrawn.



Mitchell Tomlinson
Chief Executive Officer
Peckham, Inc.